No. 11,860

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE FONG FOOK,
Appellant,

vs.

I. F. WIXON, District Director, Immigration and Naturalization Service, Port of San Francisco,
Appellee.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT.

WAYNE M. COLLINS,
Mills Building, San Francisco, California,
Counsel, American Civil Liberties Union of Northern California, an unincorporated association, Amicus Curiae.

GEORGE G. OLSHAUSEN,
THEODORE TAMBA,
San Francisco, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURTS' JURISDICTION.

This is an appeal by the appellant, petitioner below, taken on February 10, 1948 (R. 37) from a final order of the District Court below (R. 36) denying his petition for a discharge from the restraint upon his liberty imposed by the appellee, respondent below, after a hearing had on the writ of habeas corpus issued thereon. The denial was laid on the grounds contained in that Court's opinion (R. 26).

The District Court below had jurisdiction of the proceeding under the provisions of 28 USCA, Secs. 451-453, and this Court has jurisdiction to review its

decision under the provisions of 28 USCA, Secs. 463(a) and 225(a)First.

The pleadings necessary to show the existence of the jurisdictions are the petition for the writ (R. 2), the writ (R. 20), return thereto (R. 21), the traverse (R. 23), order denying the petition (R. 37), opinion of the District Court (R. 26) and the notices of appeal (R. 37).

STATEMENT OF THE CASE.

Lee Fong Fook, the appellant, is an adult native-born citizen of the State of California and of the United States. He is a resident of San Francisco and a person of Chinese lineage. He is a veteran of the recent war and a recipient of an honorable discharge from the Army which was awarded him by the government in acknowledgement of its gratitude for the faithful services he performed for the country.

After the cessation of hostilities he visited China and subsequently returned to San Francisco accompanied by his Chinese bride. Arriving at the Golden Gate they were confronted by the U. S. Immigation and Naturalization Service which forbade their entry into the American Garden of Eden. The denial, however, was not made upon an accusation they had partaken of the forbidden fruit of the garden. It was made for what the immigration authorities were pleased to view as a sin committed by the State of California. Having exhibited this unnatural kindness to the citizen veteran and his bride the Immigration authorities seized them, cast them into jail, held them

incommunicado, deprived them of access to counsel and refused to enlarge them on bond.

Thereafter the Immigration Service subjected him to an administrative examination at which he was represented by counsel of his own choosing. At that hearing the appellant produced duly certified copies of the judgment of the California Superior Court in San Francisco establishing the fact that he was born in California (R. 42), the birth certificate that had issued thereon (R. 41) and his honorable discharge from the Army (R. 43). The authenticity of these documents was admitted. The Immigration examiner, however, attached trifling importance to what is judicially regarded as evidence of an indisputable nature. He viewed these documents as disputable evidence of appellant's citizenship and denied that judgment efficacy on the issue of his citizenship. This was a peculiar way for the government to honor a veteran. It was a peculiar way for the government to treat a citizen.

His protestations being ignored the appellant applied to the District Court below for a writ of habeas corpus to secure liberation from the restraint imposed upon his liberty. There being no disputed factual issues to be decided a hearing thereon was dispensed with and the legal issues were resolved against him for the reasons set forth in the District Court's opinion. Although he was granted temporary release from detention for the purpose of enabling him to prosecute an appeal to a conclusion an unconditional discharge from custody was refused and his petition was denied. From that denial this appeal was initiated.

QUESTION INVOLVED.

When the authenticity of a final judgment of a California Court establishing the fact of appellant's birth in California is admitted, which *ipso facto* demonstrates him to be a citizen of the sovereign State of California and also of the United States, can that judgment be subjected to a collateral attack by the U. S. Immigration and Naturalization Service in an administrative proceeding?

ARGUMENT.

I.

CALIFORNIA IS SOVEREIGN IN ITS DOMAIN AND LEGAL SPHERE.

Historical Background.

When the Spanish explorer Cabrillo and his companions visited the Santa Barbara region in 1542 the Pacific littoral was inhabited by Mongolian descended peoples who had an advanced culture of their own. The Spaniards thought they had discovered a new land. The section of the continent, however, was in its regular place and had been so for some millions of years. The Indian natives whom they encountered had descended from Chinese stock that had inhabited it for several thousand years. The Indians welcomed them and the adventurers, missionaries and migrants who later followed in their footsteps and settled the region. It didn't occur to them to raise the bar of an immigration rule against the intruders. Such a concept was as alien to them as the absence of such a

bar would be to the occidental occupants of the area today whose right thereto rests on a foundation of conquest.

Thereupon the geographical division now known as California became subject to Spanish suzerainty by the traditional method of appropriation of the land and the exclusion of the Indians. In 1824 Mexico threw off the Spanish yoke and California passed to the rule of the Mexican Republic. The inhabitants thereupon became subjects and citizens of Mexico under the Spanish civil law.

On June 14, 1846, Fremont and his companions, raised the Bear Flag and on July 4, 1846, while presuming to represent the will of the inhabitants, proclaimed the independence of California. The white population was not consulted and the Indians were ignored in the matter. In the absence of organized armed resistance they seized the police power of the area by a display of force. On the ascendancy of the new regime the inhabitants, save the Indians who still were viewed as chattels and Mexicans who continued to give allegiance to Mexico, became citizens of the new Republic by virtue of their residence in the area.

On August 15, 1846, it appears that California was declared to be and was recognized as a Territory of the United States. See New Intern. Encyclopedia, Vol. IV, p. 343. Captain Stockton's proclamation so declaring is dated August 17, 1846. See H. Ex. Doc. No. 4, pp. 669-670, 29th Congress, 2nd Session; Bancroft's History of California, Vol. XXII, pp. 283, 284.

Behind the whole movement for forcing the short-lived independence upon its inhabitants there lurked, concealed from a majority of its inhabitants, the U. S. Government's policy of aggrandizement Fremont was almost rewarded with the presidency of the United States for his part in this political affair. When California became a territory of the Union the United States accepted the political status of its inhabitants as citizens of California and accorded them the rights of territorial citizenship.

How National and State citizenship arose.

The Treaty of Guadalupe Hidalgo fixing the boundaries between Mexico and the United States was entered into on February 2, 1848, and proclaimed on July 4, 1848. See 9 Stat. at Large 922. Article VIII thereof enabled Mexican citizens of California to acquire U. S. citizenship by a simple expression of preference. Those who failed to express a preference for U. S. or Mexican citizenship within one year were deemed to have elected to become U. S. citizens. The residents of California who elected U. S. citizenship and those who did not elect Mexican citizenship within that time thereupon automatically became U. S. citizens without further formality. Legality attaches to this method of adopting foreigners as citizens. See *Boyd v. Nebraska,* 143 U.S. 135, 175-176.

On November 13, 1849, a convention of delegates drafted and adopted the California Constitution of 1849. This was necessary because Art. IV, sec. 4, of the federal Constitution guarantees each State a republican form of government on its admission to the

Union. At the time California recognized as its citizens its inhabitants and voters, the latter being those white adult male resident citizens of the United States and those of Mexico who elected to become U. S. citizens or were blanketed in as such under the Treaty of Guadalupe Hidalgo. See Art. II, sec. 1, Const. of 1849. In Art. XI, sec. 2, of that Constitution the existence of a class of citizens is admitted and, although it did not define State citizenship with precision, it acknowledged and treated them as its own citizens in accordance with the *jus soli* pursuant to Anglo-American concepts of jurisprudence. Thereafter, on September 9, 1850, California was admitted as a State into the Union. See 9 Stat. at Large, 452, Chap. 50.

The constitutional guaranties of National and State citizenship.

Ratification of the first ten Amendments of the U.S. Constitution which had been approved by Congress on September 25, 1789, was completed on December 15, 1791. These amendments are limitations on federal power. By a joint resolution of the House and Senate on July 21, 1868, the 14th Amendment which had passed Congress on June 13, 1866, and had been ratified on July 9, 1868, was declared to be a part of the Constitution. As early as 1829, however, it was recognized that a U. S. citizen was also a citizen of the State where he resided. See *Gassies v. Ballon,* 6 Pet. (31 U.S.) 761. The converse also seems to have been true for Mr. Justice Curtis' dissent in the *Dred Scott* decision, 60 U.S. 393 at 576, asserts that "every person born on the soil of a State, who is a citizen

of that State by force of its Constitution or laws, is also a citizen of the United States". Both decisions doubtlessly were based upon the *jus soli* concept derived from the common law of England.

The 14th Amendment guaranteed national citizenship to the native-born and to the naturalized. It didn't grant State citizenship to them for that already had been conferred by the respective States. However, it guaranteed State citizenship to the native born and naturalized persons who were State residents. In consequence, it is a restriction on the power of the States to deny State or Federal citizenship to the native born and naturalized residents.

In 1872 California defined State citizenship with precision, thereby putting into writing what long had been the accepted practice in determining its citizens. It enacted Section 51 of the California Political Code which declares the citizens of the State to be:

> "1. All persons born in this State and residing within it, except the children of transient aliens and of alien public ministers and consuls;
>
> 2. All persons born out of this State who are citizens of the United States and residing within this State."

In 1879 California adopted its second Constitution.

At the time the U. S. Constitution was adopted in 1787 all residents of the several States, with the probable exception of Indians, slaves regarded as articles of merchandise and aliens refusing allegiance, were considered to be citizens of the United States.

This was not because they were born on American soil for a great many had not been. It was because they were residents of the several States and, therefore, they were the "people" of the new nation. Although the Constitution mentions "citizens of the United States" (Art. I, sec. 3); "a natural born Citizen, or a Citizen of the United States" (Art. II); "Citizens of another State" and "Citizens of the same State" (Art. III, sec. 2); "Citizens of each State" and "Citizens in the several States" (Art. IV) and "Citizens of another State" (11th Amend.), it does not define any of these terms. The "people of the U.S." and "citizens" were synonymous terms. See *Dred Scott v. Sandford,* 19 How. (60 U.S.) 393, 404, 15 L.Ed. 691, 700. Congress had not defined U. S. citizenship either. National citizenship, in fact, then was determined by the individual's State residence. Each resident of a State at that time was deemed to be a U. S. citizen. See *Minor v. Happersett,* 88 U.S. 21, Wall. 162, 167, declaring:

> "Whoever, then, was one of the people of either of these states when the Constitution of the United States was adopted, became ipso facto a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or classes of persons were part of the people at the time, but never as to their citizenship if they were."

Citizenship by naturalization, although referred to in the Constitution, did not spring into existence until 1790 when Congress enacted the first naturalization statute of March 26, 1790. See 1 Stat. 103. It, too, was made dependent upon residence in this country.

Anticipating the adoption of the 14th Amendment Congress declared persons born in the United States to be citizens of the United States. See 8 USCA, Sec. 1, from the Act of April 9, 1866, 14 Stat. 27, now 8 USCA, Sec. 601a. However, until 1868 when the 14th Amendment became a part of the Constitution there was no constitutional provision defining U. S. citizenship by birth. See *Dred Scott v. Sandford,* supra. Similarly, until the 15th Amendment was adopted the right of a citizen of the United States to vote for Federal or State officers was not defined. Citizens of the United States could not vote for Federal or State officers unless the laws of the States where they resided so provided. See Art. I, secs. 2 and 4, U. S. Constitution. The qualifications for electors were determined by the respective States and varied in those States. The practice and right of the States to determine those qualifications and hence the right to vote for Federal and State officers was recognized by the United States before the 15th Amendment was adopted which guaranteed suffrage against encroachment by the United States and the States. Since then the suffrage qualification practice and laws of the States has continued to be recognized by the United States despite the fact that the right of United States citizens to vote for Federal officers would seem

to be an inherent right free from qualification restriction by the States. The recognition has been based upon the fact that Congress has not legislated upon the matter or provided the machinery for the election of Federal officers and, therefore, leaves this field open to the States to legislate upon without restrictions except those arising from discrimination on account of race, color, or previous condition of servitude which is prohibited by the 15th Amendment.

In this manner it has come about that inherent Federal rights have been restricted with the full knowledge and consent of the United States for inequalities still exist in the qualification requirements of voters in the various States. The 19th Amendment prohibits discrimination by the Federal and state governments for reason of sex but age, literacy and other qualification tests still may be imposed upon the right to vote by various States. Residents of the District of Columbia, established as the seat of the U. S. Government by Congress in 1790, are incapacitated from voting for Federal officers because of a want of residence in the States and also for want of a congressional statute setting up the machinery for their suffrage rights.

Because the rights of national and State citizenship had been subjected to inequalities and restrictions the nation found it necessary to define national and State citizenship with precision and to guaranty the political status of both. This was done by the 14th Amendment which declares:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

The Amendment is a limitation on the power of the States because it contains a guaranty against abridgement by the States of the privileges and immunities of national citizenship. Nothing therein contained prohibits the States, however, from determining the State or national citizenship of any persons within their borders. A guaranty raises a secondary right to determine the political status it guarantees. The primary right is lodged in the States. If the guaranty is denied by a State the United States may intervene to preserve the guaranteed right. However, we are not here concerned with a denial by the State of a constitutional guaranty. The State of California has not infringed appellant's national citizenship. The 14th Amendment does not expressly guarantee the appellant's national citizenship against infringement by the United States but it does so by implication for implicit in a guaranty is a prohibition against infringement of the rights it protects. The due process clause of the 5th Amendment, however, safeguards the national citizenship status of the appellant against infringement by the United States for it is an express restriction on Federal power.

II.

FACTS RELATING TO BIRTH ARE DETERMINABLE BY STATE LAW.

By Section 10600 of the Health and Safety Code enacted in 1939, as amended in 1943, the State of California provides that:

> "* * * any person beneficially interested in establishing of record the fact of birth and the time and place of such birth * * * may file with the county clerk a verified petition for an order judicially establishing the fact of, and the time and place of the birth * * * in either of the following courts.
>
> (1) The superior court of the county in which the birth * * * is alleged to have occurred.
>
> (2) The superior court in the county in which the person whose birth * * * it is sought to be established is residing, * * *."

Under Section 10602 service of a copy of the petition is required to be made upon the district attorney of the county where the petition is filed together with notice of the time and place of the hearing. It authorizes the district attorney to appear at the hearing and to oppose the making of the order.

Under Section 10604 which appeared in the 1939 statute publication of notice of the hearing was required to be made but this section was not re-enacted when the statute was revised in 1943. Its deletion seems to have been decided upon for the following reason. During the war proof of birth and therefore, of citizenship, was a prerequisite to employment in

a majority, if not all, of our national defense industries. The publication requirement of this section evidently was causing an unnecessary delay in the employment in those industries of native born residents who lacked birth certificates because they were born before the State set up bureaus of vital statistics and issued birth certificates or because birth records were lost or destroyed. The delay was hampering our national defense and war efforts. In furtherance of those national purposes the State of California, in 1943, disposed of the publication requirement to speed up the factual determination of the birth of those lacking birth certificates to enable the nation to utilize their services in those industries.

The proceeding is one *in rem* or *quasi in rem* to determine a status of the petitioner. Actual notice is given the State of California by service of process upon and notice of the hearing to the county district attorney. In consequence, an opportunity is given to the State to appear and oppose the petition. In the instant case the district attorney, as the law enforcement agent of the State, was served with process and was given notice of the time and place of the hearing of appellant's petition. He declined to enter an appearance. It is to be assumed that his non-appearance was occasioned by the fact that the investigation he is required to conduct into the facts convinced him of the truth of the recitals of the petition. It was an admission and a concession by the executive department of the State that the appellant was born in California at the time and place alleged in the petition.

The California Superior Court is a Court of competent jurisdiction and of record. It had jurisdiction over the status of the appellant and a right and power, under State statute, to determine the facts relating to his nativity from the evidence adduced in favor of the petition and any that might have been offered against it. The proceeding was not a mere administrative act of issuing a delayed birth certificate which is mere disputable evidence of birth. It was not an *ex-parte* proceeding. It was an *adversary* judicial proceeding. The Court weighed the facts, resolved its findings of fact into a conclusion of law and rendered a formal judgment establishing the fact of appellant's birth in this country from the evidence introduced. The rendition of that judgment was a judicial act. No appeal was taken from that judgment and, as a result, it has become final and conclusive. It no longer is subject to a direct attack upon its validity by an appeal and, because of the absence of a want of jurisdiction which would render it void, it is immune from attack in any suit of any type in the same or any other judicial forum whatever. See *Pico v. Cohn,* 91 Cal. 129, establishing the rule in California and following the Federal rule enunciated in *U. S. v. Throckmorton,* 98 U.S. 61. See also, *Tinn v. U. S. District Attorney,* 148 Cal. 773, where the States applied the rule to a State naturalization judgment, and *The Acorn,* 1 Fed. Cas. No. 29, where the rule was applied by a Federal Court to a State naturalization judgment.

State citizenship is a matter peculiarly to be determined by State law. The sovereign granting it is the State. With that power the Federal Government, its legislative, executive and judicial departments, cannot interfere without invading a domain denied to it. The State of California never has ceded to the United States its right to determine who are and who are not citizens of California. The 14th Amendment declares that a native born person is a citizen of the State wherein he resides and, consequently, guarantees that State citizenship and, at the same time, guarantees national citizenship to such native born person. These guaranties prohibit the several States from denying State and National citizenship. Neither guaranty deprives the States of the right and power to determine the State and National citizenship of persons subject to their jurisdiction.

If a concurrent power were lodged in the United States and the several States to determine the facts of birth and of State and National citizenship the invocation of the power by one of the independent sovereigns and its final decision on such status would preclude the other from independent action thereon if for no other reason than the duplication and multiplicity of lawsuits which would prevent finality to any determination thereon and, in consequence, be contrary to public policy. If Federal Courts are to distrust the judgments of State Courts simply to satisfy the whims of Federal administrative agencies the judicial machinery of the States and State law have lost their efficacy and have been supplanted by Federal caprice.

Federal agencies in California, including the United States District Attorney and the United States Immigration and Naturalization Service, ever have been aware of the existence, purpose and use of the California statute relating to the establishment of the facts of birth. Any of them could have intervened in those State proceedings if they had desired to do so. The fact that they did not do so in appellant's case suggests a willingness on the part of the Federal Government to let the matter be determined by the State Court and to accept and abide by its decision.

Thousands of judgments establishing the fact of birth have been rendered by the California Courts. If finality is not to be declared an attribute of those judgments they will be ignored in their entirety by Federal agencies. In consequence the Federal Courts well might find themselves swamped with the filing of complaints by thousands of plaintiffs seeking relief in the nature of declaratory judgments to determine their national citizenship. It is not inconceivable that the Federal judicial machinery would be retarded if it did not suffer a break down simply because of the multitude of such cases.

III.

A STATE COURT JUDGMENT DETERMINATIVE OF FACTS UNDERLYING FEDERAL RIGHTS WHEN FINAL MAY BE RE-EXAMINED ONLY BY THE U. S. SUPREME COURT.

Only two methods exist whereby a State judgment may be set aside. One is a direct attack by a timely appeal through the medium of the State Appellate

Courts and thence to a review by the United States Supreme Court in the manner provided by 28 USCA, Sec. 344. The other is through the instrumentality of a direct attack in the form of an independent bill in equity to set aside a State judgment that has become final on the ground that it is void for want of jurisdiction in its rendition. Such a suit necessarily would have to be brought in a Court of the State where the final judgment had been rendered for only the State tribunals and the United States Supreme Court, under 28 USCA, Sec. 344, can acquire jurisdiction to entertain or review the facts upon which the final judgment was based. Neither type of attack has been launched against the validity of the State judgment involved herein which established appellant's birth in this country and which, by operation of Section 51 of the California Political Code and the 14th Amendment, placed his State and National citizenship beyond question.

State Courts have jurisdiction and power to determine facts underlying both Federal constitutional and statutory rights. Their determination of the facts upon which their judgments are based cannot be set aside or those judgments be disturbed by Federal District Courts and Circuit Courts of Appeals for want of statutory authorization so to do. They are utterly lacking in any such jurisdiction. See *People v. Bruce* (CCA-9), 129 Fed. 2d 421, 423, cert. den. 317 U.S. 710, deciding they have only that jurisdiction which Congress prescribes. The sole Federal tribunal authorized to re-examine such facts and to render a different judgment is the United States Supreme

Court. See *Powell v. Alabama,* 287 U.S. 45. However, alleged errors of State Courts in cases involving State statutes or State constitutional provisions are not subject to revision even by the United States Supreme Court. *Hebert v. Louisiana,* 272 U.S. 312. The only jurisdiction that Court may exercise to revise State decisions is in cases where "the federal Constitution was contravened". *Powell v. Alabama,* supra, at page 55. The rule was phrased aptly in *Rogers v. Peck,* 199 U. S. 425, in the following words:

> "It is only where fundamental rights, especially secured by the Federal Constitution, are invaded, that such interference is warranted."

The proceeding had in the State Court was not one involving an invasion of the appellant's basic constitutional rights either by the State or the Federal government. Neither was it one by him or the State involving an invasion of the province of the Federal government. In nowise whatever was that proceeding one in contravention of the Federal Constitution. On the contrary, it was one which, by operation of law, was in furtherance of State and also Federal purposes. It is the only method provided by Federal or State law whereby the appellant could prove his nativity and, in consequence, his State and National citizenship. Neither the Constitution nor Congress sets up any judicial machinery for determining the facts relating to birth or for determining State or National citizenship and, as a result, the State of California acted entirely within its own lawful powers.

While the above cited cases determine the rule applicable to facts underlying Federal constitutional rights the same rule is applied to findings of fact underlying Federal statutory rights. See *Chicago, M. & St. P. Ry. Co. v. Coogan,* 271 U.S. 472, 474. Even where Congress, by statute, has pre-empted to the Federal government a sphere of jurisdiction which supersedes all State laws upon the subject but authorizes or recognizes the procedural machinery of the State as a proper medium for a determination of a person's rights thereunder the United States Supreme Court will not extend its review of a decision of the highest State tribunal beyond the point of ascertaining whether the evidence exhibited in the record is sufficient, as a matter of law, to sustain the State trial Court's judgment. Beyond this point it has refused to go. See *Chicago, M. & St. P. Ry. Co. v. Coogan,* supra, where the Court reviewed a decision of the Minnesota Supreme Court, involving rights asserted under the Federal Employers' Liability Act, under which both Federal and State Courts have concurrent jurisdiction of suits for injuries suffered. See 45 USCA, Sec. 56.

It is apparent, therefore, that no authority is vested in the Immigration Service to disregard the State Court judgment here involved or to re-examine or alter the findings of fact upon which that final judgment was based. It has neither statutory nor constitutional authority to dispute those facts or to deny the efficacy of that judgment establishing the fact of appellant's birth in California from which his State

and National citizenship spring by operation of constitutional and statutory law, viz., Section 51 of the California Political Code and the 14th Amendment. For the reasons and upon the authorities above cited neither the trial Court nor this Court is empowered to disregard that judgment or to deny it efficacy.

IV.

FEDERAL AGENCIES AND COURTS ARE BOUND BY CALIFORNIA LAW.

1. **Congress has conceded State power to determine nativity and citizenship status.**

Although Congress has prescribed a procedural method whereby a foreign born person may be naturalized it has not prescribed a method whereby the facts relating to the birth of natives may be established and citizenship by birth in this country be determined. There being no federal judicial procedure set up for such a purpose it is evident that Congress intended the States to determine these matters for themselves without involving the United States Courts in needless litigation. It is apparent, therefore, that the United States impliedly consents to the determination of these facts by the procedural methods adopted by the several States and has sanctioned the practice and those methods by recognizing State sovereignty in the matter and the competency of State judicial tribunals to determine such issues.

Similarly, in Title 8 USCA, Sec. 701, Congress has conferred upon State Courts a power to naturalize

resident aliens. The States may avail themselves of this power or refuse to do so in an exercise of their own discretion. They do not act as agents of the Federal government in naturalization proceedings but as independent sovereigns. See *In re Fordiani,* 120 A. 338, 98 Conn. 435. Congress is not empowered to set up State appellate machinery for a review of State naturalization decrees and has not attempted to do so. An attempt on its part so to do would constitute an unwarranted interference by the Federal government with the sovereignty of the States. However, Congress recognizes that the States, in a separate exercise of their own sovereign powers, have the right to prescribe their own methods of appellate review when they appropriate the power to naturalize which Congress has made available to them. See *Tutun v. U. S.,* 270 U.S. 568, and *In re Bogunovich,* 18 Cal. (2d) 160. It is apparent that the States could deny State appellate review in such cases simply by failing to prescribe a method of appeal. Obviously, a naturalization decree of a State Court which had become final could not be ignored by Federal agencies and Courts. It would not be subject to attack except for jurisdictional reasons and even such an attack would have to be brought in a State Court in the jurisdiction where the attacked judgment had been rendered. Even a decree of naturalization granted in a Federal Court would not be subject to attack in a Federal Court except on the jurisdictional grounds specified in the Nationality Act of 1940, 8 USCA, Sec. 738. It is obvious, however, that a State naturaliza-

tion judgment could not be set aside in a State Court on the grounds provided by that Federal statute because there is no California statute similar to the Federal statute which would confer statutory jurisdiction upon the State Court to entertain such suits.

Congress has no power to deprive the native born of national citizenship for that status is a constitutional status. It is beyond the reach of Congress, the executive and the judiciary. It is doubtful whether expatriates abroad can lose their national citizenship under the expatriation statute, 28 USCA, Sec. 801. If that statute is to be held valid the Courts would be under compulsion to justify such a holding by determining that the government thereunder does not deprive the expatriate of citizenship but that the act of the expatriate constitutes a voluntary repudiation of citizenship by which he raises a procedural barrier against proving his substantive right to citizenship. The substantive right, however, is as fundamental as any part of the Constitution and is the very basis upon which that charter is erected and, in consequence, can no more be destroyed than can the divisions of government.

2. Constitution reserves to States the power to determine nativity and citizenship status.

Under our system of the distribution of powers between the States and the Union all those powers which are not allotted expressly to the Federal government and are not forbidden to the States are powers exercisable only by the States. As a result

whenever the Federal government lays claim to a right to wield a particular power it first must show affirmatively that the power has been vested in it by the Constitution.

Inasmuch as the States have not delegated to the United States their inherent power to determine the nativity status of their residents this power necessarily is lodged exclusively in the respective States or in the people thereof by the explicit reservation of such power contained in the 9th and 10th Amendments of the Federal Constitution. Impliedly, therefore, or by its silence on the matter and the absence of congressional legislation on the subject, Congress recognizes, sanctions and concedes the exclusive jurisdiction of the States in this matter.

3. The California law deciding the issue of birth is decisive on appellant's State and National citizenship and binds Federal Courts.

In the absence of a Federal statute providing a Federal judicial method whereby the facts relating to birth may be established judicially the law of the State of California automatically is invoked within the coordinate Federal district and becomes applicable and controlling on Federal Courts therein by virtue of Title 28 USCA, Sec. 725, which provides as follows:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at com-

mon law, in the courts of the United States, in cases where they apply."

The rule long has been that, except in matters governed entirely by the Federal Constitution or acts of Congress, the law to be applied in any case is the law of the State, there being "no federal general common law". See *Erie R. Co. v. Tompkins,* 304 U.S. 64, so deciding and also stating that "whether the law of the State shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal concern". See also, *Peterson v. Chicago G.W.R.Co.* (CCA-8), 138 Fed. (2d) 304, holding that Federal Courts must follow the same substantive rule in such cases that a State Court would have applied and stating the rule to be necessary to prevent the accident of diversity of citizenship from disturbing equal administration of justice in coordinate State and Federal Courts sitting side by side.

The law controlling the instant case was determined by the California Superior Court in accordance with California law and practice. The judgment of that Court establishing the facts of appellant's birth by an application of California law therefore becomes binding on the Federal Courts in this district and elsewhere under 28 USCA, Sec. 725. In consequence, the decision below was erroneous.

The right to confer State citizenship lies originally and immediately in the States. There is no statute of Congress depriving the States of the right to de-

termine either State or National citizenship. Neither by the Constitution nor by statute has the United States attempted to reserve unto itself the power to determine the facts relating to an individual's birth or to determine State or National citizenship. The 14th Amendment contains a guaranty that the States shall not deprive a native-born resident of either type of citizenship. The intent of the framers of that Amendment doubtlessly was to promote the purposes of the State and not to act in derogation thereof as the Immigation Service and the Court below have done.

V.

THE JUDGMENT OF THE CALIFORNIA COURT IS ENTITLED TO FULL FAITH AND CREDIT.

Inasmuch as the judgment of the California Court establishing the fact of birth is safe from attack upon its finality and conclusiveness in its own forum it could not be subjected to attack in sister States. *Williams v. North Carolina,* 317 U.S. 287, 294. In accordance with principles of comity made applicable by the full faith and credit clause of Art. V, Sec. 1, of the U. S. Constitution the judgment becomes binding and controlling upon proceedings thereafter commenced in a sister State when a certified copy of that judgment is produced therein.

Pursuant to its constitutional authorization Congress implemented the full faith and credit clause by

enacting Title 28 USCA, Sec. 687, which provides, in part, as follows:

> "And the said records and judicial proceedings, so substantiated, shall have faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

This statute extended the full faith and credit provision of the Constitution to all Federal as well as State Courts. *Davis v. Davis,* 305 U.S. 32; *People v. Bruce* (CCA-9), 129 Fed. (2d) 421, cert. den. 317 U.S. 710. The effect that a State judgment has in a sister State or a Federal Court depends upon and is precisely that which is given it by the State law where it was rendered. See *Board of Com'rs for Buras Levee Dist. v. Cockrell* (CCA-La.), 91 Fed. (2d) 412, 416, cert. den. 302 U. S. 740; *Stoll v. Gottlieb,* 305 U.S. 165, rehearing den. 305 U.S. 675; and the early case of *Mills v. Duryee,* 7 Cranch 481, 485, 3 L.Ed. 411, 413. Under this statute Federal Courts are required to give such a judgment the same full faith and credit that sister States are required to accord and, in consequence, Federal agencies may not deny that faith and credit. The duty to give full force and effect to the Constitution and laws of another State is obligatory. *Smithsonian Institution v. St. John,* 214 U.S. 19, 53 L.Ed. 892, 897. Full faith and credit means that one sovereign accords the judgment of another the same effect that it has in the forum of the sovereign where rendered. See *Williams v. North Carolina,* 317 U.S. 287, overruling *Haddock v. Haddock.* The faith and

credit that must be given is not fragmentary but must be full. *Davis v. Davis,* supra.

For the reason that the judgment establishing appellant's birth automatically demonstrated his State citizenship that citizenship is not a status the United States may abridge. State citizenship is granted by the State in the exercise of its own sovereign power. The only concern the United States has with State citizenship is to enforce the guaranty contained in the 14th Amendment against a denial thereof by a State. This appears to be the sole power the United States may exercise in connection with that status.

The full faith and credit clauses of the Constitution and the statute required the Immigration Service and the Court below to give full faith and credit to the judgment of the State Court. They also required them and this Court to take judicial notice of and give effect to Section 51 of the California Political Code which confers State citizenship upon the appellant. See *U. S. v. Brechtel* (CCA-Ia.), 90 Fed. (2d) 516; *Kaye v. May* (CCA-NJ), 296 Fed. 450. The question of his national citizenship was removed from the field of dispute by operation of the guaranty of national citizenship contained in the 14th Amendment which was invoked when the judgment became final and validated that status from the time of his birth.

VI.

FEDERAL AGENCIES AND COURTS CANNOT DENY THE PRIVILEGES AND IMMUNITIES GUARANTEED EITHER TO CITIZENS OF A STATE OR OF THE NATION.

The appellant demonstrated to the California Court that he was born in this State and that fact was resolved in his favor after a hearing on the merits. That judgment has become final. By operation of law, invoked by Section 51 of the California Political Code, that judgment signified the appellant was a native born citizen of California and *ipso facto* a citizen of the United States by invocation of the 14th Amendment.

As a citizen of the sovereign State of California the appellant is entitled to exercise all the privileges and immunities of that *State citizenship* in each and all of the other States in the Union under the provisions of Art. V, Sec. 2, of the U. S. Constitution which specifically provides, as follows:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

These privileges and immunities, which flow from State law determining State citizenship, are exercisable also within the Federal jurisdiction without discrimination. Among the inherent rights that spring from National citizenship is that of freedom of movement. See concurring opinions in *Edwards v. California,* 314 U.S. 160, at 178, 183, 184, and *Crandall v. Nevada,* 6 Wall. 35, 48-49. Among the inherent rights that spring from State citizenship is freedom of move-

ment safeguarded by the privileges and immunities grant of Art. IV, Sec. 2, of the U. S. Constitution. See the majority opinion in *Dred Scott v. Sandford,* 19 How. (60 U.S.) 393, 422-423, 15 L.Ed. 691, 708, where Taney, C. J., in discussing the power of the States but not of the United States, conceded that the privileges and immunities provision of that Article granted a State citizen a constitutional right of ingress to and egress from all the States. A deprivation of this fundamental right of State citizens by the Immigration Service, a Federal agency, appears to be repugnant to that constitutional provision as well as to the full faith and credit clause.

Although the Immigration Service is authorized to detain the appellant temporarily on his return from a visit abroad (*U. S. v. Sing Tuck,* 194 U.S. 161, 168), it would appear that the detention could not be extended unreasonably and that, upon his production of the certified copy of the judgment of the California Court establishing his birth and, therefore, his State and National citizenship, it was obliged to lift the restraint.

VII.

A JUDGMENT OF A STATE COURT WHICH HAS BECOME FINAL IS NOT DISPUTABLE EVIDENCE BUT IS CONCLUSIVE EVIDENCE OF ITS RECITALS.

In a hearing before an administrative agency as well as in judicial proceedings a certificate of birth issued by a State executive agency would be mere

evidence of the facts relating to birth. It would be evidence of a disputable nature. See *Lee Lung v. U. S.* (CCA-9), 217 Fed. (2d) 48; *Lee Leong v. Patterson,* 186 U.S. 168; and *Lee Choy v. U. S.* (CCA-9), 49 Fed. (2d) 24. However, we are not concerned here with a question of disputable evidence. The dignity of a certified copy of the judgment of a State Court of general jurisdiction, the authenticity of which is admitted, cannot be reduced to the classification of disputable evidence simply because an administrative agency desires to treat it as such. See the early case of *Mills v. Duryee,* 7 Cranch 481, 483, 3 L.Ed. 411, 412-413, asserting the rule of conclusiveness. The Immigration Service is not empowered as a Federal executive agency to launch a collateral attack upon a judgment which is the product of State judicial power. A final judgment is conclusive on the material facts which were in issue. A solemn judgment is something far superior to mere evidence of the facts relating to birth and, if it be viewed as evidence at all, it must be viewed as conclusive and indisputable evidence of the facts it decides. Such a judgment cannot be impeached or ignored by the U.S. Immigration Service. Even in direct attacks upon naturalization judgments, brought by the U. S. for the jurisdictional reasons specified in 8 USCA, Sec. 738, Federal Courts can invalidate those judgments only upon satisfaction of the "clear, unequivocal and convincing evidence" rule announced in *Schneidermann v. U. S.,* 320 U.S. 118, 167-168, and *Baumgartner v. U. S.,* 322 U.S. 665. Even that rule of evi-

dence was ignored by the Immigration Service and the Court below as also was the estoppel effect the appellant's honorable discharge certificate from the Army raised. However, the Immigration Service is not authorized to disregard evidence and to substitute whim in the determination of the rights of persons whom it denies admission and seizes for deportation purposes.

Inasmuch as there were no factual issues in dispute in the Court below, the facts being admitted, the appellant was not required to pursue or exhaust his administrative remedies by appealing to the Board of Immigration Appeals before prosecuting his remedy by habeas corpus proceedings. In *U. S. v. Sing Tuck,* 194 U.S. 161, 169, the Supreme Court stated that the exhaustion of administrative remedies was a condition precedent to the institution of a petition for a writ of habeas corpus where factual issues were in dispute and required determination. The Court declared, however, that the rule was otherwise where questions of law only were involved and pointed out that in *Gonzales v. Williams,* 192 U.S. 1, it recognized the right of a remedy by a petition for the writ without exhausting administrative remedies where questions of law only were involved.

CONCLUSION.

It seems to be a general notion that the presence of friendly aliens is a menace to something indefinable in America. Evidently we have become a nation given to vague fears. We have lost our sense of proportion and have grown humorless if we have reached a state of alarm over their presence and are so quick to mistake an American citizen for an alien simply because his face reveals his Chinese lineage. We ignore legality and abandon our sense of propriety when we seek to exclude a native-born American from the land of his birth simply because of a nebulous suspicion the immigration authorities may entertain of him because they believe that a Chinese face is strange to America and betrays a person of foreign nationality.

For the foregoing reasons we submit that the decision of the Court below was erroneous and should be reversed and the appellant be discharged from the custody of the appellee.

Dated, San Francisco, California,
April 2, 1948.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel, American Civil Liberties Union of Northern California, an unincorporated association, Amicus Curiae.

GEORGE G. OLSHAUSEN,
THEODORE TAMBA,
Of Counsel.